No. 80-900

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN CARBONE AND JOSEPH CARBONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the group of tavern owners and others associated in this case for the purpose of operating and controlling the local tavern business constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*

2. Whether the proof at trial established multiple conspiracies rather than the single conspiracy charged in the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is not yet reported. No opinion was rendered by the district court.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1980. The petition for a writ of certiorari was filed on December 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner John Carbone was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count II); one count of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d) (Count I); four counts of interfering with interstate commerce by threats or violence, in violation of 18 U.S.C. 1951 and 2 (Counts III-VI); two counts of obstructing a criminal investigation, in violation of 18 U.S.C. 1510 and 2 (Counts VII and VIII); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 and 2 (Counts IX and X); one count of obstructing state law enforcement, in violation of 18 U.S.C. 1511 (Count XI); and three counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts XV-XVII). Petitioner Joseph Carbone was convicted on the RICO conspiracy and mail fraud counts as well as one of the counts of interfering with interstate commerce by threats or violence (Count VI). Petitioner John Carbone was sentenced to concurrent terms of 20 years' imprisonment on Counts I and II; five-year terms of imprisonment on each of the remaining 12 counts, to be served concurrently with each other but consecutively to the sentence on Counts I and II; and a total fine of $163,000. Petitioner Joseph Carbone was

sentenced to concurrent terms of 18 years' imprisonment on Counts I and VI and five years' imprisonment on Counts XV-XVII, as well as a total fine of $38,000. The court of appeals affirmed (Pet. App. 1a-45a).

The extensive evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-7a, 20a-22a, 23a, 29a, 42a-43a). In brief, it established the existence of an informal association of several tavern owners and others in Pierce County, Washington, which engaged in criminal activity to advance the tavern businesses of its members. The association was led by petitioner John Carbone and remained in operation from 1972 through the fall of 1978.

Between 1972 and 1977, the Carbone organization arranged for three unprofitable taverns owned or managed by its members to be burned down in order to collect the insurance proceeds. Thereafter, the mortgages and debts were paid, and the premises were remodeled or new establishments were opened nearby. In addition, between 1976 and 1978, the organization committed at least seven acts of arson against the establishments of its competitors in the tavern, disco or topless dancing business in Pierce County.

In 1976, the Internal Revenue Service initiated a criminal investigation into the activities of petitioner John Carbone. Carbone accused Jerome Weinstein, a former business associate, of being an informant for the IRS. Shortly thereafter, Weinstein's home was firebombed several times, and Weinstein himself was assaulted and seriously injured. Carbone sought $10,000 from Weinstein for protection against these attacks.

In the spring and summer of 1978, the government consensually recorded telephone conversations in which Ronald Williams, a "chief lieutenant" in the Carbone organization, admitted responsibility for arranging the attempted assassination of a state liquor control board supervisor in

November 1977. Immediately preceding the assassination attempt, three taverns owned or managed by petitioners and Williams had been closed because of topless dancing violations.

In addition, undercover agents penetrated gambling activities at two taverns owned and managed by members of the Carbone organization. Gambling at these establishments included blackjack and pot limit poker games, which were illegal under state law. An agent, posing as a potential buyer of one of these taverns and the related gambling activities, was informed that a price could be negotiated to include a protection arrangement with the sheriff's office. Williams arranged a meeting between the agent and Sheriff George Janovich.

In the fall of 1978, the FBI infiltrated a plot by the Carbone organization to bomb a topless dancing establishment that was the principal competition for a tavern owned by petitioner Joseph Carbone.[1] The FBI arranged for an undercover agent to pose as a bomber-for-hire. Williams gave the agent the number for Vista Auto Sales, which was owned by petitioner John Carbone, and set up an initial telephone call at a designated date and time; petitioners and Williams were later observed listening to the scheduled phone conversation. Shortly thereafter, petitioner John Carbone was seen leaving petitioner Joseph Carbone's tavern with Williams, who carried the identifying signal specified by the bomber. On November 28, 1978, agents arrested petitioners and Williams at Vista Auto Sales at the time the final telephone contact with the purported bomber was expected.

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[1]The topless dancing establishment had previously been the object of two arsons, and its owner's home had been entered by co-defendant Richard Francis Caliguri, the organization's "strong arm," who threatened the occupants with bodily injury unless operations were ceased.

ARGUMENT

1. Petitioners contend (Pet. 7-11) that the conduct for which they were charged and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts in this case were based on an alleged "enterprise" consisting of an association organized for exclusively illegal ends, and that the RICO statute is applicable only to "enterprise[s] * * * hav[ing] some preexisting quality of independent legitimacy" that are subsequently corrupted by racketeering activity (Pet. 9). Petitioners note that there is a conflict among the circuits on the proper construction of the RICO "enterprise" element.

As discussed in the government's petition for a writ of certiorari in *United States* v. *Turkette*, cert. granted, No. 80-808 (Jan. 26, 1981), the circuits are indeed divided on the question whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" under RICO.[2] A substantial majority of the courts of appeals have, as petitioners acknowledge (Pet. 8-9), sustained the government's position that the RICO statute does not exclude illegitimate enterprises from its coverage.[3] For the reasons stated in our petition in *Turkette*, we believe that the Court should grant certiorari in that case to resolve the conflict on the scope of RICO.

However, it is unnecessary to defer consideration of the petition in the present case pending disposition of *Turkette*.

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[2]A copy of the *Turkette* petition is being provided to counsel for petitioners.

[3]In urging a contrary result, petitioners rely primarily (Pet. 10) on the decision of the panel in *United States* v. *Sutton*, 605 F. 2d 260 (6th Cir. 1979). However, that opinion was vacated when the Sixth Circuit granted rehearing en banc, and the full court of appeals has now reversed the panel's decision and adopted the view of the majority of circuits that the RICO statute embraces illegitimate as well as legitimate enterprises. See *United States* v. *Sutton*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980) (en banc).

The instant indictment described the enterprise to be "a group of individuals associated in fact * * * for the purpose of controlling and attempting to control the tavern business in and around Pierce County, Washington * * *" (Indictment, Count I, para. 2), and it stated that petitioners and others, "in various combinations, were associated in and engaged in owning, operating, or controlling taverns, night clubs, and amusement centers * * *" in Pierce County (Indictment, Count I, para. 4). These undertakings were not inherently illegal; rather, petitioners and their confederates were "[o]rganized and acting for ostensibly lawful purposes" (Pet. App. 12a), and their participation in the affairs of the legitimate tavern business through "a pattern of racketeering activity" (18 U.S.C. 1962(c)) is plainly proscribed by the RICO statute. Moreover, their use of a "legitimate business as an alleged 'front' for illegal gambling * * * is precisely the type of operation Congress intended to encompass within the enterprise concept" (Pet. App. 12a). Finally, the concern expressed by those circuits adhering to a narrow definition of "enterprise"—that the RICO statute should not "cover purely sporadic criminal activity" (*United States* v. *Anderson*, 626 F. 2d 1358, 1367 (8th Cir. 1980), petition for cert. pending, No. 80-766—is inapposite here, for petitioners' operation was far more than merely "a loosely confederated group of criminals who perform unrelated criminal acts" (Pet. App. 11a). Thus, the court of appeals correctly concluded that "the charged enterprise satisfies the narrower definition of a group 'organized and acting for some ostensibly lawful purpose either formally declared or informally recognized' " (*ibid.*, quoting *United States* v. *Sutton*, *supra*, 605 F. 2d at 264).[4]

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[4]Contrary to petitioners' contention (Pet. 8, 10-11), the district court's charge to the jury is not inconsistent with the court of appeals' analysis. The jury was instructed that the term "enterprise"

> basically means a group of persons who form an association by virtue of their concerted criminal activities rather than as a legal

2. Petitioners contend (Pet 12-14) that the offenses involving Jerome Weinstein were independent of the tavern-related crimes, and therefore that the evidence at trial established multiple conspiracies rather than the single conspiracy charged in the indictment. This claim is without merit.

In the present case, "there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy." *United States* v. *Kearney*, 560 F. 2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 971 (1977). See also, *e.g.*, *Koolish* v. *United States*, 340 F. 2d 513, 524 (8th Cir.), cert. denied, 381 U.S. 951 (1965). The main objective of petitioners and their confederates was "to operate and control enterprise taverns and related activities with minimal interference from law enforcement agencies" (Pet. App. 13a). Toward this end the

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> entity such as a corporation or partnership. The alleged plans and purposes of this group * * * *center around the tavern business in Pierce County, Washington, and the attempts to profit therefrom by a pattern of criminal activity* * * *.
>
> * * * * *
>
> [To convict on Count I], you must find that there existed a combination of two or more individuals who willfully associated together as an *"enterprise"* * * * *to control and attempt to control the tavern business in and around Pierce County, Washington* * * *.

Instruction Nos. 23, 26 (emphasis added). These instructions, which are only selectively quoted by petitioners, adequately informed the jury that an "enterprise" could be an informal association rather than a legal entity such as a corporation or partnership, and that the "enterprise" alleged in this case involved the tavern business in Pierce County and the defendants' efforts to profit from that business by criminal means. Nothing in the instructions contradicts the court of appeals' conclusion that petitioners' convictions under the RICO statute were properly based on racketeering activities "for ostensibly lawful purposes" (Pet. App. 12a). And, given the central role of the tavern business in petitioners' scheme, the jury's verdict of guilty clearly entailed a finding that petitioners had participated in the affairs of a legitimate enterprise.

conspirators bribed local law enforcement officials and attempted to assassinate the state liquor inspector when he became a threat to their operation. The crimes committed against Weinstein, who was the former business partner of petitioner John Carbone and was believed to be an informant for the Internal Revenue Service, were undertaken for exactly the same purpose—to reduce "interference" by the authorities. Indeed, Weinstein's suspected cooperation with the IRS posed a particular risk for the participants in the enterprise, since, as co-defendant Williams stated to an undercover agent, the only investigators they feared were the "feds" (*id.* at 14a). And petitioner John Carbone stated his belief that law enforcement efforts could not succeed without a "stoolie" (*ibid.*). Accordingly, the attacks on Weinstein promoted the overall objective of the conspiracy by seeking to discourage his cooperation with federal authorities and to deter others from such cooperation (*id.* at 15a). As the court of appeals concluded (*id.* at 14a), "[t]he so-called 'Weinstein matter' was not merely a separate, personal vendetta by John Carbone."

In addition to the common goals of the Weinstein and tavern-related crimes, the existence of a single conspiracy is also supported by the similarity of such factors as the times and places of the two sets of offenses, the participants in the offenses, and the methods of committing the offenses. See, *e.g.*, *United States* v. *Cambindo Valencia*, 609 F. 2d 603, 622-626 (2d Cir. 1979), cert. denied, No. 79-6002 (May 12, 1980); *United States* v. *Becker*, 569 F. 2d 951, 960 (5th Cir.), cert. denied, 439 U.S. 865 (1978). The attacks upon Weinstein occurred between 1976 and 1978, within the period of the tavern-related crimes and during a time when the Carbone enterprise was especially active in using violence to further its criminal ends. Moreover, there were overlapping participants in the Weinstein and tavern-related incidents; for example, co-defendant Williams asked co-defendant Robert Valentine to find someone to commit the arsons and

assaults in both matters, and co-defendants Lamont Zemek, David Levage, and Harry Wilcox participated in the Weinstein as well as the tavern-related arsons (Pet. App. 14a). Finally, the same method of threats, arson, and extortion was used against Weinstein as against the enterprise's competitors in the tavern business.

Thus, contrary to petitioners' assertion, the Weinstein and tavern-related offenses were part of the same overall conspiracy.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioners argue (Pet. 12) that the district court should have instructed the jury on multiple conspiracies. However, because there was no variance between the allegations of the indictment and the proof at trial, such an instruction was not required. See, *e.g.*, *United States* v. *Kearney*, *supra*, 560 F. 2d at 1363; *United States* v. *Perry*, 550 F. 2d 524, 531 (9th Cir.), cert. denied, 434 U.S. 827 (1977). At all events, the court's charge stated that a conspiracy involved "a mutual understanding to try to accomplish a common and unlawful plan," that a co-conspirator was one who participated in the conspiracy "with knowledge of the essential nature of the unlawful plan," and that, in order to convict, the jury had to find that "the conspiracy alleged in the Indictment" was proven beyond a reasonable doubt (Instruction No. 25); these instructions adequately focused the jury's attention on the government's obligation to establish a single conspiracy consisting of a common plan and agreement.